IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE

CIVIL REVISION APPLICATION NO.199 OF 2004

Vijaykumar & Company (India) Ltd. & ors. Petitioners
vs.
Shri Bhogawati Sahakari Sakhar
Karkhana Ltd. Respondent

Mr.Pratap Sampat with Mr.Vinod B. Singh for the petitioners.

Mr.Amit B. Borkar for the respondent.

**CORAM : B.H. MARLAPALLE,J.**

**DATED : 19th August 2005**

**P.C.**

Heard the learned counsel for the petitioners and the defendants in Special Civil Suit No.205/1997. In the said Suit, the defendants had taken out an application at Exhibit 35 for amendment of the written statement filed at Exhibit 16 and by the order dated 9th August 2004, the said application came to be rejected by the learned 5th Adhoc Additional District Judge at Kolhapur. Thereafter on or about 17th September 2004 the defendants submitted yet another application at Exhibit 44 praying for leave to submit the dispute to arbitration in view of clause 14 of the agreement dated 21st August 1995 entered into between the parties. This application at Exhibit 42 came to be rejected by the learned 5th Adhoc Additional District Judge, Kolhapur on

27th October 2004. Both these orders i.e. the order dated 9th August 2004 passed below Exhibit 35 and the order dated 27th October 2004 passed below Exhibit 42 are challenged in this Civil Revision application.

2. At the first instance, it is required to be noted that both these orders were required to be challenged by taking out separate appropriate proceedings, more so because both these orders were passed on two different applications and the order below Exhibit 35 was passed on 9th August 2004 i.e. before the application at Exhibit 42 was presented on or about 17th September 2004. In addition, the order dated 9th August 2004 rejecting the application for amendment cannot be challenged in a Civil Revision application. I have, therefore, proceeded to hear the Civil Revision Application only against the order dated 27th October 2004 rejecting the application at Exhibit 42.

3. The impugned order notes that the defendants had originally filed their written statement at Exhibit 16 on or about 23rd April 1999 and no application under Section 8(1) of the Arbitration and Conciliation Act, 1996 (For short, "Act of 1996") was filed by the defendants before the said date. The application at Exhibit 35 was submitted on or about 6th September 2003 for amendment of the written statement and even before

this date, the defendants did not submit an application under section 8(1) of the Act of 1996, this amendment application was rejected on 9th August 2004 and thereafter the application at Exhibit 42 was filed purportedly claiming to be an application under section 8(3) of the Act of 1996.

4. If the defendants sought leave to submit the dispute for arbitration, the application was required to be filed under section 8(1) of the Act of 1996 before the filing of written statement and the said sub-section reads as under:

> "8(1). A judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration."

5. The Court below referred to the provisions of Section 34 of the Arbitration Act, 1940 as well as the provisions of section 8(1) of the Act of 1996 and noted that the application submitted for leave to refer the dispute for arbitration could not be entertained when it was filed much after the written statement was filed and the application for amendment of the written statement was rejected. It is also required to be noted that the trial of the suit had reached the stage of recording

evidence when the application was presented. The reasoning given by the trial Court reads as under:

> . "In the present case, admittedly the parties to the suit have surrendered to the jurisdiction of this court, and the suit has been reached at the stage of evidence. It is worthy to note that either the plaintiffs or defendants have not claimed exercise of their rights through arbitration. In view of these clear admissions and when the suit has reached to the stage of the evidence, I am of the considered view that the application filed by the defendants to refer the dispute for arbitration u/s. 8(3) of the Arbitration Act, 1996 to stay the proceedings u/s.34 of the Arbitration Act, 1940, is not tenable at this stage. Therefore, by relying upon the case i.e. State of Uttar Pradesh & Anr. v. M/s.Janki Saran Kailash Chandra & anr., AIR 1973 Supreme Court 2071, I hold that the application is devoid of any merits and, therefore, it is liable to be rejected."

6. It is also interesting to note that the order dated 9th August 2004 rejecting the application for amendment at Exhibit 35 observed in paragraph 2 as under:

> "2) The defendants by filing their written statement at exh.16 have resisted the claim of the plaintiff denying the suit claim and also denying the alleged contract contending that no agreement was entered between the plaintiff and defendants as alleged by the plaintiff to supply gunny bags. Hence, the plaintiff is not entitled to claim compensation in case of default in supply of gunny bags on their part."

. The learned counsel for the defendants submitted that

these observations are contrary to the record and if that be so before the application at Exhibit 42 was moved on or about 17th September 2004, it was necessary for the defendants to apply to the trial Court for review of the order dated 9th August 2004 for correcting the facts. This has not been done and, therefore, this submission cannot be accepted.

7. The reasoning set out by the trial Court in rejecting the application at Exhibit 42 cannot be faulted and section 8(1) of the Act of 1996 clearly sets out the time limit to move an application for referring the disputes for arbitration. The application moved by the plaintiffs was not in consonance with the said statutory requirement and, hence the challenge to the impugned order must fail at the threshold.

8. Civil Revision application is rejected summarily.

**(B.H. MARLAPALLE,J.)**